

COMMISSIONERS PROCEEDINGS
NOVEMBER 22, 2005
CLARK COUNTY, WASHINGTON

The Board convened in the Commissioners' Hearing Room, 6th Floor, Public Service Center, 1300 Franklin Street, Vancouver, Washington. Commissioners Boldt, Stuart, and Morris, Chair, present.

PLEDGE OF ALLEGIANCE

The Commissioners conducted the Flag Salute.

BID AWARD 2424

Reconvened a public hearing for Bid Award 2424 - Exhibition Center Mobile Bleachers. Mike Westerman, General Services, read a memo recommending that Bid 2424 be awarded to the sole bidder.

Stuart asked about the market analysis that determined that the price was competitive.

Westerman explained the checks that were made.

There being no public comment, **MOVED** by Boldt to award Bid 2424 to Northwest Recreation of Washington on Selah, WA, in the total bid amount of \$106,963.25, including Washington State Sales Tax and grant authority to the County Administrator to sign all bid related contracts. Commissioners Morris, Boldt, and Stuart voted aye. Motion carried. (See Tape 240)

The Board of Commissioners adjourned and convened as the Board of Health

PUBLIC COMMENT

There was no public comment.

CONSENT AGENDA

There being no public comment, **MOVED** by Boldt to approve items 1 through 2. Commissioners Morris, Boldt, and Stuart voted aye. Motion carried. (See Tape 240)

BOARD OF HEALTH COMMUNICATIONS

There were no communications.

The Board of Health adjourned and reconvened as the Board of Commissioners.

PUBLIC COMMENT

There was no public comment.

CONSENT AGENDA

There being no public comment, MOVED by Boldt to approve items 1 through 7.
Commissioners Morris, Boldt, and Stuart voted aye. Motion carried. (See Tape 240)

PUBLIC MEETING: DAYBREAK MINE SECOND REMAND FINAL ORDER

(STOREDAHL) REZ98-011; CUP2004-00002; SPR98-034; SHL99-001; SHL2000-00009;
HCG98-179; WTP98-038; SE98-098

Held a Public Meeting to consider an appeal of the Clark County Land Use Hearing Examiner's decision regarding a Type III development application and environmental review for a rezoning of approximately 100 acres of Agriculture 20 (AG-20) land to apply the Surface Mining Combining District (AG-20-S) site plan review, habitat, wetland and shoreline permit approvals for an expansion of an existing surface mining operation onto 178 acres of an approximately 292-acre site.

The Board of Commissioners will receive no public comment, oral or written, at this public meeting.

VERBATIM BY LOUISE RICHARDS, Clerk of the Board of Clark County Commissioners

Morris: Now we are ready for, I believe it's actually the fourth time that this board has met in public on an issue related to the Storedahl application for mining and so the first item of business is to certify that we have read the record. I have read the record. It was a short one this time.

Stuart: I've also read the pertinent parts of the record.

Boldt: And, I have also read the record.

Morris: OK. Now in the last meeting that we had—actually the February meeting—we had a challenge to Commissioner Stuart which was dealt with openly. It is a matter of record. It was matter of tape and DVD. That challenge has been raised again by Storedahl in its November the 10th brief with a little elaboration. In addition to that, Storedahl in their November the 10th brief has also suggested that I am not able to sit in an unbiased fashion on this appeal. They have based their comments on me...according to their correspondence – actually it wasn't comment on me, it was comment on my husband. And they have based that on apparently a conversation that they overheard somewhere, but the date and time and location of that conversation and the participants are not listed. I would make an observation first and Mr. Horne is frowning at me I know and then I would like to move in to something that we don't normally do here. The November 10th brief spoke to correspondence that had been written by Perkins Coie and signed by an attorney on that staff whom I don't know to both Bronson Potter, Counsel to the Board of County Commissioners and to David MacDonald, Counsel for Friends of the East Fork. It inquired as to whether or not my husband had contributed to Friends of

the East Fork or Fish First, or was a member of either organization. The same inquiry was asked of Mr. Potter and Mr. MacDonald. In addition to that, Mr. Potter was also asked by legal counsel from Perkins Coie and for Storedahl if he had...Mr. Potter had been a part of either of these two organizations or had supported them. Now I want to clarify because the November 10th brief suggests that somehow or other Mr. Potter is the counsel for both my husband and me so let me make this clear. Mr. Potter is not my husband's counsel. If the appellant wanted to know anything about my husband they should have more properly addressed their questions to him. He is listed in the phone book. He is there this morning. He is watching and if you would like to take a break and make a phone call to inquire of him, which is the proper approach I believe, I believe that the Board would be more than happy to take a short recess so you can go and do that. So let me get to that point in my disclosure and then I'll come back to it. Second point is that I did disclose—I have the verbatim transcript—my relationships, historic relationships, on both sides of this issue with Fish First, with Friends of the East Fork, and with Mr. Mackie and with a number of the other people who have been participants in the discussion on the Storedahl side. And I concluded by saying, so I have friends who are for it and friends who are against it. And I stand firmly with my friends. And I asked if either side at that point of time believed that I was not able to rule in an unbiased fashion and asked if they wanted to challenge me at that point in time. I want to disclose that I've not had conversations in an ex parte fashion about this case, but the newspaper article yesterday generated a number of conversations about the newspaper article itself and I understand that Mr. Mackie had some later conversations in the day with other people about that article too. So just want you to know that there was conversation about the news article. Mr. Horne, Mr. Mackie, fellow Commissioners, being very aware that [neither] nor discovery are normal parts of the proceedings for the Board of County Commissioners I would invite you Mr. Mackie to have a conversation with me to ask me any questions you would like to ask about me, since you have not done that, and I will answer them because I think it is important in order to keep the clarity of this discussion abundantly unblemished that would serve in the best interest of all if you want to come and ask me some questions. So, Mr. Horne, unless you stand in strong resistance, or unless my fellow commissioners strongly resist, I'm going to ask Mr. Mackie to come and do this now. I get to ask you questions back.

Sandy Mackie: Fair enough. Commissioner Morris, I have the utmost respect for you and what you've done for Clark County. At the last public meeting, which I did not attend, a statement was overheard by someone who works for us that they were surprised at the participation and they named both Mr. Potter and your husband as members. That came back to me and it raised a question because that seemed to be beyond the disclosure that you gave us. I very intentionally did not make it a public issue at that time. I sent a letter to Mr. Potter saying this has come up. It's hearsay. I felt I had a duty to inquire and it put me on the duty of inquiry, so I made an inquiry. Mr. Potter responded to us that he had no connection, which I accepted, and he said I need to get that information from you. I'm not entitled to talk to you while you are in the [inaudible], so that put me in an awkward spot, if you look at the dates in the letters. So then, likewise I'm not entitled to talk to Fish First or Friends of the East Fork except through their counsel, Mr. MacDonald. So you notice my second letter. Again, I did not publish these. I did not write a brief because I was on the duty of inquiry. So I sent a letter to Mr. MacDonald saying can you clarify where this situation was because it appeared to me that it was beyond what I understood your initial statements to be. I understood your initial statements. They are

on the transcript. I know what those are. At the level that those indicated, as you said, friends on both sides, I had no objection to you participating. I was more concerned if there was a membership that was involved, if there was some sort of long term financial commitment of some sort that I think would be material and needed additional disclosure. Mr. MacDonald did not respond to my letter. In order, because the question had not been officially answered I felt compelled to make it part of the record which I was trying to avoid by seeing if I could get the clarification first. It was not my intent to embarrass you. It was not my intent to engage in anything other than open direct communication and I believe that we have done that. I tried to get answers for somebody to say no, Mr. Mackie, you misunderstood. Since that wasn't given to me in order to preserve what my clients' rights are in this matter, I felt compelled to make it part of the record. So that's why I made it part of the record. The inquiry is, I believe, is to you as the County Commissioner, which said is your...what I asked Mr. Potter. Can you confirm whether or not your husband was a member of an office – it was indicated it may have been more of Fish First? I have no idea whether that was an accurate statement, that's why I asked your attorney to see if he could clarify the record for me. So that would be my first question.

Morris: My husband is not a party to this record. Would you like to take a break and call him?

Mackie: Well, I mean, the answer I'm looking for is on the record if that's however we would like to get there.

Morris: You are certainly welcome to go and get it and then come back and put in on the record yourself.

Mackie: Alright, well let's...

Morris: But my husband and I do not speak for each other, Mr. Mackie. If you want that answer you will need to contact him and I offer you that opportunity now.

Mackie: And I will take advantage of that if you wanted to take break now or should we conclude the rest of this and then...

Morris: Thank you. No, we'll take the break because I don't want to have any taint on the record here.

Mackie: All I'm asking for is the answer to the question. I have not said whether it is true or not. It was an inquiry and that's where I am today.

Morris: I am not the person to answer that.

Mackie: Fair enough. Then if you have afforded me that opportunity, is there a phone that I may use and a phone number that I may access?

Morris: I think I have one in my pocket. I would be surprised that you don't have one in yours.

Mackie: Well, no. I make a point of leaving mine in the car.

Morris: That's very kind of you. Thank you. We prefer that.

Mackie: But I believe Mr. Dentler has one.

Morris: Is there someone here who's got a cell phone.

Mackie: I believe Mr. Dentler does.

Morris: Alright Mr. Dentler does. Mr. Dentler, the telephone number is—and we are going to take a break so that you can go and do this in the hall—the telephone number is 573-9455.

Mackie: 573-9455

Morris: 573-9455 and you are free to ask him whether or not he is a member of Fish First or Friends of the East Fork or an avid fisherman or anything you would like. You can ask him how many fishing poles he's got.

Mackie: No, my inquiry was very limited. Thank you. Then, if we are on break –

Morris: With the indulgence of the Board, we'll wait.

[BREAK TAKEN]

Morris: We continue our discussion on the Storedahl. Mr. Mackie, do you have an answer?

Mackie: And Commissioner Morris, I'm happy to clarify your husband and I spoke this morning. He clarified that he has never been an officer and a member and other than attending the occasional social banquet, as you had disclosed before, that's his only connection.

Morris: Good.

Mackie: And, I'm happy to receive that information. That's what I was looking for in the first place. I need to ask you the same question. So that on the record, have you ever been an officer or member of either organization?

Morris: No, I have not and I am more than delighted to answer those questions. I have not. I have routinely attended Fish First banquets for years as I said in the past. I think the only possible thing, if you wanted to go back and research all of my records for years, would be that I did make a pledge to Fish First—a three year pledge of fifty dollars a piece and I must have done it in about 2002 for projects, and the checks are clear. They are for projects so I don't believe that there's another way that there's anything possibly left to disclose, but you are certainly welcomed to ask me any questions you like.

Mackie: And I thank you for the clarification. That's what my letter was designed to illicit just to make sure that I understood the nature and extent of the relationship.

Morris: OK. I would just like to ask you then next time if you want to know something about me, please ask about me in your initial letter, which you did not.

Mackie: Well, the initial comment actually did not make reference to you, and –

Morris: Right, so of course I wouldn't answer it.

Mackie: Fair enough.

Morris: Alright, Thank you. OK, now do you want – I should ask you, do you want me to reveal any biases? Do you want to challenge me? Are you satisfied that I'm able to sit in a fair role here?

Mackie: Commissioner, with the statements that have been made so far we accepted you first time around with what I consider to be the minor social participation that was made.

Morris: Great. Thank you.

Mackie: You have told us that there are no other connections. Thank you very much.

Morris: Thank you. Alright. I believe that that pretty much takes care of me. Anybody else? Alright, are we ready to move on to the substance. OK. Who would like to open the discussion?

Boldt: OK.

Morris: I've discussed enough here for a little while I think.

Boldt: To me, well, to me it's extremely simple and it's a little easier maybe for me if the 61 acres can go the 71 acres, right? Yeah, right. It's very confusing. I wish we would call these names or something, but anyway – and I guess as for me, we have granted the conditional use on the 71 acres and for me we have granted the conditional use because of the history of that use so essentially it has relatively no conditions. The only conditions that we have granted on the existing is that they have a dry wash instead of a wet wash for their gravel. So as I looked at if they can impute or if they can process, I don't see any – I guess even in our code it says that any expansion or alteration and so I would differ with the hearings examiner. I think that bringing rock in across the street does not expand or alter the difference. I think in my view we are kind of caught maybe in the middle, is that on one side it's environmental reasons and the other side it's profit and I think they both are handled within themselves. And so just for me it's the conditional uses. I looked yesterday and the day before at other conditional uses about – you have a use, a conditional use, within a zone and then it is limited to that. And there are references throughout our code where yes, you grant a particular use, conditional use, within a zone and then you allow outside products to come in to be processed or whatever. So going along with that I don't see any difference so I would disagree with

the hearings examiner and allow the material to come across the road into the 71 acres that we had previously agreed on.

Stuart: And for me, just looking at the question—the question that was asked by this board for the hearings examiner and just saying and everybody seems to agree on the question that this proceeding is remanded to the hearings examiner for the limited purpose of determining whether or not the nonconforming use rights include the right to process on the 71 acre site material extracted from the 61 acre site. So for me I was looking at the limited question of does the nonconforming use include the processing of offsite materials from the 71 acres or from the 61 acre site on the 71 acres. I agree it should be A and B or something. For that, if we are looking at what the nonconforming use is, the nonconforming use, based on what the hearings examiner the hearings examiner said, well, when you determine the nonconforming use you need evidence. The burden is on the applicant to provide evidence of what is included in the nonconforming use. There was no evidence provided as to whether there was or was not processing of offsite materials from the 61 on the 71 acres and the hearings examiner went further and started saying some other things, but the main point for me in his decision was him saying, well, there was no evidence and burdens on the applicant. So now the applicant comes back and says well, the burden test is wrong in this. I didn't find the burden test to be wrong on this, but what I did start looking at is, OK, if this isn't part of the existing nonconforming use, which I don't believe it is based on the evidence provided and based on having to overturn the hearings examiner as clearly erroneous, I couldn't find that. But then the question is, well, as an expansion the applicant says, well, even if it is not then what about as an expansion or alteration of it? And then it should be automatically granted because of all the type I review that's already – because of all the permits, the conditional use permits and otherwise that have been granted. So I started looking at that and saying, well, yeah that makes some sense and then I started looking back through the record and seeing, well, a lot of why the conditional use permits and all of that was done was the original decision talked a lot about the 350 acres and talked about the whole site and the hearings examiner said, well, you know if this is going to happen then we want to make sure that we do some good work on this. So for me that was a completely separate proposal and so I started thinking, well, it seems like a different circumstance, but nevertheless they went through permitting review process but then what I found out was and we'll have to have legal counsel tell me if I'm right or wrong but what I found was that a specific permit is required for an expansion of a nonconforming use. That permit's never been applied for. So in this case we asked a specific question. The question was, does it include? The answer the hearings examiner came back with was “no.” I don't find any evidence to overturn. Now the question as to whether it can be expanded to include that, maybe it can, but that's beyond the scope of this appeal. It's beyond the scope of this remand for me. It goes to if you want that then you fill out the specific application and tell me – I mean is there a specific...because maybe I read it wrong, I don't know.

Chris Horne: Good Morning, Commissioners. For the record my name is Chris Horne. In Title 5 or Title 40, Chapter 530 is the specific nonconforming rights chapter of the code and it does correctly – or, Commissioner, you are correct. It does impose upon the property owner or the party asserting a conforming right the burden of proving it. What's more, it does provide for the expansion, alteration, or change in uses of nonconforming uses and provides a process through which the county looks to under what circumstances

that might be done – what mitigating conditions might be imposed, but it looks to it in detail and, yes, there is a separate permit application for expansion alteration or change in use of a nonconforming use and those are dealt with separately under our code and as I reviewed the permits that were sought that have been described and explained to the examiner: the site plan review, the habitat reviews, the wetlands reviews, the conditional use permit reviews and the rezone applications—none of them included, nor was any evidence submitted that would have addressed the issues under 45.30. So it is not yet an application that's been filed by Storedahl and I think you correctly explained the code.

Stuart: OK, well, then the change of circumstances as far as why this isn't just part and parcel of the same thing – it's just an extension and doesn't require a permit. In an earlier decision the hearings examiner did talk about the significance of bringing -- of processing offsite materials and just saying because the importation of offsite material for processing presents substantial impacts in terms of transportation on the region's road system as well as crushing, washing, sorting, and loading of material. So there was a little bit in there, even by the hearings examiner, that this is something that there may be impacts that we want to look at in a permit and if there is a specific permit that's required for this, I just don't feel like this is the right venue to have that discussion. That's a permit that would have to be applied for and then staff would work with the applicant to figure out what mitigation could be done to make that work. Because it may be that that's the way that we should go and that's the way that's appropriate, but like I said, I just don't feel like this is the venue to be discussing it. So for my part on the specific question that we were asking, I didn't find evidence to overturn the hearings examiner's decision.

Morris: Thank you both. I reviewed last night the recordings of both the July and the August discussion on this issue of whether or not Storedahl was entitled to process on the 71 acres. For the life of me, I don't know why I made the suggestion that we send it back to the hearings examiner at that time, but I did. And it's probably because we didn't have clarity from the hearings examiner on that particular issue. I do understand it and I want to make sure that I understand it correctly from a legal perspective that the applicant, Storedahl, may apply for and be granted an application for expansion or intensification of processing on the 71 acres. They just have not done it yet. Is that correct? They may do that and they may well get it?

Horne: Well, I can't automatically say it will be granted. The code has many –

Morris: But they may.

Horne: Yes.

Morris: Or they may not.

Horne: They certainly have a right to and the code provides a mechanism through which intensification, change in uses, expansion or alterations are all addressed by the code and a mechanism for their approval is provided.

Morris: Ok, thank you. Now wait...I have another question. They may also on the 61 acres, which is properly zoned, apply for permits to crush, process, wash all of that because that is an ancillary activity to the mining itself.

Horne: Yes, the code –

Morris: Those are all allowed uses under that zone.

Horne: That's correct.

Morris: Alright. So, thank you. That brings me to a conclusion that we are just nit picking things here and I think it's time again for the Clark County Board of Commissioners to finish this and send it to the Superior Court, whichever court that may be, to let them define and make decisions about some of these finer issues. I cannot overturn the hearings examiner today and I can't overturn the hearings examiner today because I don't find any evidence in the record to do it. I don't find any evidence in the record for much of anything. There was no new evidence that was presented at the hearings examiner's decision. The pragmatics of it are – and we've gotten to the level of legal verbosity that we have completely obscured a practical element of this. They can process on the 61 acres with a permit. They can haul from the 61 acres to any place in this state that can legally process. So they can haul. They can make noise. They can make dust. They can do all of those things and the curiosity here is that the one place they can't do it is on the place where they have said they have nonconforming rights. But that's what we said and that's what the record shows and that's what the hearings examiner has said. So for my part, I will uphold the hearings examiner on this, which must make him happy. Once someone upheld him and send this on to the Superior Court. We have known from the very beginning that we are only a stop along the way. So I think that I would like for it to go to Superior Court and I would like any other processes that are going to occur here to occur as Commissioner Stuart has suggested, in a separate venue than here. So with that, is there a motion?

Stuart: Thank you, Madame Chair. I move to uphold the hearings examiner's decision on the Daybreak Mine Second Remand Final Order, Resolution 2005-11-18. Is there a Resolution? It says "RES number."

Morris: We don't have a resolution. We are just upholding the hearings examiner at this point.

Stuart: So, strike the stuff about the resolution. Just uphold the hearings examiner's decision on the Daybreak Mine Second Remand Final Order.

Morris: OK, seconded. Moved and seconded to uphold the hearings examiner's decision on the Storedahl Second Remand decision and order. All those in favor say aye.
Aye.

Stuart: Aye.

Morris: Motion carries.

Stuart: Did you want to...

Morris: I'm sorry. All those opposed?

Boldt: No. Thank you.

Morris: I am so very anxious to have this over with and have this behind us and I want to ask if the Board will indulge me for just one more minute before we leave the room and we hopefully conclude our part because I'm not going to send this back to the hearing examiner, no matter who challenges the language of the resolution later on. Again, Mr. Potter, I would – sorry, Mr. Horne, I would expect you to stop me at any point if anything that I am saying along the time appears to taint the record in any way. So please, would you listen very carefully. This has been on my mind for a very long time and I'm going to get it off. The Columbian newspaper this morning on their editorial page encouraged the Board to declare its bias in this issue and to loudly proclaim our bias. I was actually in hopes that Mr. Mackie would ask me to do so. He didn't, so I'll do it on my own. And I do. I want to declare my bias here. I want to declare that I do have a deep bias in favor of preservation of the East Fork of the Lewis River. But I also want to say that this application is not—despite years of newspaper reporting to the contrary—an application to mine in the East Fork. This is not an application to mine in the floodplain of the East Fork or in the riparian area of the East Fork. It is not an application to do that. And that has been misrepresented in the press for so long that I was surprised myself when I read the record for the first time—the totality of the application in preparation for the February meeting on this—that they are not mining in the East Fork. I thought they were. Sort of going in, parting the waters, mining, and then letting them run back together again. That is not the case here. So while I have a strong prejudice in favor of preservation of the East Fork, I have a prejudice against bad and inaccurate news reporting just as well. I want to clear that up for the record because it has bothered me for a very, very long time. This was not an application to mine in the East Fork. The applications that have anything to do with either the floodplain or the riparian zone—and there's nothing in the riparian zone of the East Fork; it's in the riparian zone of Dean Creek—are for storage, primarily, and maybe a road. I can't remember all. But they weren't for digging holes in the ground and that is in both the floodplain for the East Fork and the riparian zone for the East Fork and riparian zone for Dean Creek. I want that one on the record. I have a bias against red herrings. We had what I call a red herring last time on shorelines. I think we had a red herring again this morning on whether or not there was prejudice on the part of the board. Sometimes you just have to cook a red herring though to get rid of it so I hope that we got rid of that one this morning. I have a bias against any press suggesting that the board should violate what is our responsibility here to sit in as unbiased a fashion as we possibly can to adjudicate matters that come before us in this forum. This is not a legislative forum and that is the most difficult element for the public to understand. We are bound by certain legal rules and requirements and we are called upon to be able to make decisions in this venue in an appeal on a land use case in an unbiased fashion. And believe it or not, we make every effort to do that and it is very hard. I have to tell you it is very hard. Especially when we have rooms full of people who are not understanding the difference in the roles that we play. But when we sit here in an appellant role on a land use decision, we are sitting in as different a role as we are sitting when we sit as the Board of Health or as the board for the – what's the financial corporation? It's slipping my mind right now.

Bill Barron: Industrial Revenue Bond

Morris: Yes, the Revenue Bond. I mean we sit in a lot of different roles and it is as different when we sit here in a land use appeal as it is in those roles. I guess that I have a bias against bad behavior on both sides when they all should know better and it hasn't just been in this room or on this particular appeal or this particular application, but this has spilled over into applications for grants. On more than one occasion I've had to recuse myself from decisions that were being made on the Lower Columbia Fish Recovery Board because one side or the other was arguing about it. And both sides have done that and so I have a bias against bad behavior from people who should know better. Now there are a lot of people who don't know better and I understand that they don't know better, but frankly the people who have been principles in this do not. So on both sides, on the Storedahl side, on Fish First side, on the Friends of the East Fork side, all the way along I think there has been a level of behavior and challenges to people's integrity that was not becoming. Mr. Mackie I want to let you know quite honestly that embarrassment was probably the last emotion I felt when I read your letters from September and I would like you to know that. In fact I never felt embarrassment, but I thank you for your consideration in telling me that that was not your goal here. I want to assure anybody who has any doubts about this that I'm perfectly capable of independent thought and that no matter which organizations or causes my husband may or may not support, that does not mean that I don't make my own decisions about that. And I think that both in my home and on this board and in all of – among all of the people who work in this building or who work with the board from outside of the building, people wish I would exercise less independent thought. Not more. So I've gotten that off my chest. I hope that I have not jeopardized the integrity of this decision in any way. I certainly didn't mean to and I hope that my delivery has been in a fashion that is not bad behavior on my part because I would hope that in my thinking about how to say this that I had reached a proper balance, but of course I'm not the person who will make those decisions. So, again, I want to thank the board, my fellow commissioners, for their indulgence here. I want to speak strongly about the integrity of these two gentlemen who sit on my right and my left. I have never worked with finer people who are more diligent in their efforts, more committed to their responsibilities in all of their roles on this board. So to both Commissioner Boldt and Commissioner Stuart, I want you to know that I have a deep deep personal regard and respect for your integrity and your intentions here in this role. So that's all I have to say. Probably too much, but it's all I have to say. Anybody else?

Boldt: No.

Stuart: Thanks

Mackie: Before you close, I have one procedural question.

Morris: Yes, sir. Certainly. We did not deal with your issue about the record. Would you like us to do so?

Mackie: I thought that the counsel's recommendation was that it became a part of the record.

Morris: Yes, it was, but if you wanted us to formally say that we certainly can.

Mackie: I think the record speaks that. This has been a confusing process. It would be useful and helpful and you need to ask your counsel, but my understanding is then when you have reached a final decision, you send a notice out that it is the final decision and that the process that I would expect following today's proceeding is to receive a written notice from you of the final decision, and it would be useful if we could just have that on the record.

Morris: We certainly will do that. OK?

Stuart: Makes sense.

Mackie: So that's that.

Morris: But as long as you are here, do you plan to argue about the language in the resolution again?

Mackie: No, I have a court of appeals who is asking me that question and if you are on the record that is useful information. So there is a subsequent step, which is a written notice and it's under your code and we understand that's what follows next from this decision.

Morris: OK. Thank you.

Mackie: And, counsel, that's correct?

Horne: That will accompany the resolution. Yes.

Mackie: That's alright. Thank you very much.

Morris: Yes, thank you. OK. If there is no other business to come before the board we are adjourned.

ADJOURNED

Tuesday, November 22, 2005, 7:00 P.M.
Prairie High School Auditorium
11500 NE 117th Avenue
Brush Prairie, WA

The Board convened in the auditorium of Prairie High School, 11500 NE 117th Avenue, Brush Prairie, Washington. Commissioners Boldt, Stuart, and Morris, Chair, present.

PUBLIC HEARING: HABITAT CONSERVATION ORDINANCE

Held a public hearing to receive public comments and consider adoption of proposed revisions to the Clark County Habitat Conservation Ordinance (Clark County Code 40.440). The proposed ordinance includes modifications made after the hearing before the Clark County Planning Commission that occurred on October 13, 2005.

Morris opened the hearing and asked for those giving testimony to provide examples if they have had any experience with the ordinance that has been on the books since 1997.

Joel Rupley, ESA Program Coordinator, said there is a timeline to finish this ordinance which is December 1, 2005, under state law. Mr. Rupley said there were five main changes to the ordinance: how the county looks at best available science (BAS); the potential for off-site mitigation; programmatic permits for routine maintenance activities for utilities and other public agencies; reduce the existing riparian management areas (buffer zones); and a proposal to provide some level of regulation of agricultural activities.

Rich Lowry, Prosecuting Attorney's Office, said it was important to note that while the Board of Commissioners has considerable discretion generally in crafting measures to comply with the Growth Management Act (GMA), that discretion is circumscribed to a fairly significant degree by the statute when it comes to critical areas. Mr. Lowry said specifically the legislature has seen fit to require that any local critical area ordinance include BAS. The hearings board decisions and court decisions that have reviewed local ordinance based upon a challenge under BAS have required that local governments produce science to justify the decisions that are made in the local ordinance. Lowry said that specifically in terms of agriculture the county has had a remand from the hearings board since the late 1990's to remove an outright total exemption that is in the current ordinance for agricultural activities. That exemption is still in the current ordinance. Mr. Lowry said there has been breaking news out of the appellate courts in the State of Washington a case out of Clallum County was decided by the Court of Appeals last month, which for the first time directly answered the question of whether the GMA requires local government to apply its critical land ordinances to existing agricultural activity. The court construed the term "development regulation" to include a requirement to apply critical land ordinances to existing agriculture activities. He said this decision may be appealed to the State Supreme Court, but as the law stands today Clark County is obligated to address critical land impacts from existing agricultural activity. He stated that the Clallum County case involved an ordinance that exempted agricultural activity within resource areas; areas that are designated and zoned agricultural or forest by the county. That exemption was not challenged and it appears that the county does have broad discretion when it comes to exempting agricultural activities within resource lands. The ordinance went further and also exempted lands that were in current use taxation from critical area regulation and specifically from habitat regulation. The court of appeals reversed the hearings board conclusion that that exemption was per say, invalid. But the court of appeals did indicate what burden the county has if it is going to attempt to exempt critical area ordinance application to agriculture activities in non-resource areas. The county would have to show using BAS that it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife, and the regulation must specifically address any threatened harm particular to the number and size of farms exempted. Lowry read the decision to require a fairly individualized analysis of what kind of impact critical areas agricultural activities may have in Clark County if we are going to try to exempt non-resource land agriculture activity from the ordinance and that we have to adopt measures that would otherwise address that harm. He emphasized that the board is not sitting with its broad legislative discretion in this

hearing, but are obligated by state law to comply with GMA and court decisions that have construed it.

Charlene Turner, 30608 NE McBride Road, Battle Ground, said there are a lot of people who have animals in the land that the county wants to fence and that issue needs to be addressed. Ms. Turner suggested a grandfather clause.

Jim Malinowski, PO Box 127, Amboy, stated that a problem with the current ordinance is that it was not implemented in the flexible manner that was promised. Mr. Malinowski felt the seasonal stream widths are too wide and felt the blanket exemption for agriculture needed to be modified. Malinowski was concerned that the non-development elements of the ordinance have not been enforced such as clearing for view corridors and excavation in and near the streams. He said if county staff is required to implement the ordinance flexibly then he would support staying with the zone widths, but if not then the widths should be reduced for the larger streams. He felt the focus should be on riparian zone and stream function rather than arbitrary limits on where a home is placed. He said that restrictions do need to be placed on large animal loading in the riparian zones because they do tremendous damage to the riparian function. He recommended that a minimum activity zone of 10% of the current zones be established for all existing uses including agriculture, and in the area of heavy animal loading it should be a requirement that those zones be fenced off. He urged the board to not treat different resource lands differently because the resource land designations were made very arbitrary and had little to do with the actual use of the land. Malinowski stated that zoning does not impact the function of the stream. He urged the board not to rush into these changes and wanted the changes to provide a more reasonable balance between stream protection and property rights.

Fred Pickering, 21546 NE Lucia Falls Road, Yacolt, owns 60 acres zoned timber, but he has about 15 acres where he raises cows and hay. Mr. Pickering said that if the ordinance was adopted in its current form, he would have to build a new barn on his property and he was not sure where he would be able to do that where it would not be within 75 feet of a Type 5 classified stream. He said he has not seen a baseline on stream quality that is coming out of the agricultural areas. He felt there should be a baseline and there should be measuring afterwards as well. He said that any approved ordinance should have monitoring and if the ordinance is not effective then there should be a sunset clause and go then back to square one.

Carl Dugger, Washington State Department of Wildlife, 2108 SE Grand Boulevard, Vancouver, suggested the Clark Conservation District contract with a qualified professional to come up with a plan specific for a particular farm or animal husbandry type of operation. This way, the farmer would be hiring their own professional and they would develop a proposal specifically for that farm. Mr. Dugger felt the county should develop a list of criteria and he offered to work with Mr. Rupley on some of the details for this list. He said he would rather see farms than a lot of housing subdivision. Dugger asked that any reviews be done by university-level scientists. He said WDFW is concerned with reduction in buffers on type four and five streams and did not think that BAS would support that. He said there are a lot of non-priority species that benefit from the 21,000 acres that would be removed from protection.

Sue Svendsen, 317 NW Bassel Road, Vancouver, Horse Council, said it would be easy for land owners to give up one acre for every five acres without economic reimbursement. Ms. Svendsen said she has made a lot of changes to her property to make it available for wildlife. She stated that under these rules she would not be able to use any of the rest of her property. She stated that she would like to see people who do voluntary improvements have exemptions from this ordinance. Svendsen asked if it would be less pollution to have her horses on her property or less to have it developed.

Ron Lauser, 1503 NE 78th Street, Suite 7, Vancouver, said there have been a lot of ponds created around the county and noted that they were created for use and not to have setbacks. Mr. Lauser said the buffer on the seasonal streams is too wide. He felt they could probably be 25-50 feet on type four streams. He said the ordinance did not contain any standard mitigation; it was on a site-by-site basis. He encouraged adopting standard mitigation that people can rely on. Lauser said in the rural areas there is a classification of farming on five to ten acres where there is quite a bit of new agriculture where one can raise grapes, blueberries, etc. and he said these types of uses would not be causing the same damage in riparian areas that animals would cause in these setbacks.

Richard Kennon, 37814 NE 234th Avenue, Yacolt, said this ordinance will have a lot to do with whether the East Fork is protected or not. Mr. Kennon submitted to the record two letters written by Carl Dugger.

Dan DuPuis, 39601 NE 228th Court, Yacolt, stated he was on the original task force for this ordinance. Mr. DuPuis said the final ordinance was never given back to the committee for final review and as a result staff inserted many buffers that were never agreed to by the group. He did not object to buffers around streams; however, he felt that if the county wanted people to cooperate, the demands needed to be more reasonable. He stated that a 10-25 foot buffer was reasonable, but not anything more than that. He said buffers can become an outright taken of property rights.

Bill Zimmerman, 9504 NE 119th Street, Vancouver, Bi-Zi Farms, stated he is a member of several farm bureaus, as well as a member of the stakeholders group. Mr. Zimmerman asked if there was a document containing the agriculture regulations that Mr. Lowry discussed earlier. He said he would be disappointed if a property owner were allowed to build a house in a riparian area, but a farmer with an on-going operation would be restricted.

Morris wanted to know if the county continued to exempt activities that are regulated by the forest practices act.

Lowry said that was true unless it was a conversion.

Morris said this ordinance would not apply to timber harvest unless it is for the purpose of converting the use of the land.

Paul Schindler, 3911 NE 199th Street, Ridgefield, stated that he is a small property owner and asked why the county is so concerned with a dry creek on his property when people in the City of Vancouver can do anything they please.

Morris replied that the county does not regulate the City of Vancouver.

Schindler replied that the specific property that he was referring to is in the county boundary and not within the City of Vancouver.

Morris asked Mr. Schindler to give the specific property information to John Tyler so the county can check into it.

Jane Barnhart, 18612 NE 182nd, Heisson, asked for the proof of the quality of the streams that are to be protected. Ms. Barnhart said it was very difficult for anyone who wants to farm in Clark County.

Morris noted that the current ordinance does not apply the critical areas ordinances to agriculture; it is exempt.

Gretchen Starke, 308 NE 124th Avenue, Vancouver, Vancouver Audubon Society, asked for clarification on exempt and non-exempt properties and if a property owner can come in to apply for a permit.

Rupley replied that non-exempt meant that a property owner would have to come and apply for a permit and would be asked to identify functions and values and protect them on the site.

Starke said that would not preclude use of the land it just means there would be some restrictions. Ms. Starke felt something needed to be done to protect the streams. She felt it would be logical to treat existing uses differently from new uses and suggested that maybe staff could work with groups of land owners to come up with some reasonable solutions. She stated that if finances are a problem then maybe there can be grants available for fencing, etc. to protect wildlife. She emphasized that if protection of wildlife and fish is a goal of the ordinance and the county that seasonal streams have to be protected. She said the small acreages presented a problem.

Paul Ritola, 8512 NE 244th Street, Battle Ground, agrees with the narrower buffers and felt there should not be buffers for field drainage areas. Mr. Ritola asked if those who grow crops are exempt from this ordinance and it only applies to those who have livestock.

Rupley replied that he wasn't sure about the current science regarding non-resource lands. Mr. Rupley said if the property is zoned agriculture or forestry the landowner would be exempt for the croplands. He was not sure how the non-zoned lands would be proposed to be regulated or exempt.

Lowry stated that the current proposal that is before the board would regulate non-animal agricultural activity in non-resource zones. He said that provision was put there to give the board broad discretion on how it will deal with this issue.

Morris asked Mr. Ritola to discuss his property and how the ordinance would affect him.

Ritola replied that he has 21 acres in Battle Ground where he grows hay. He does not have cattle on the property, but there are field drainages. He said if he was regulated under the ordinance it would wipe out one field. He stated that the economic impact on property owners should be taken into consideration when ordinances are adopted.

Alex Mattila, 16216 NE Fargher Lake Hwy, Yacolt, said the proposed ordinance was a land-theft proposal. He further explained.

Beverly Talmadge, 21601 NW 43rd Avenue, Ridgefield, owns ten acres which has seasonal drainage that runs through the property. Ms. Talmadge does not have livestock on the property, but she might want to have an animal someday and was concerned about the restrictions that might affect her in the future.

Larry Fandrich, 36901 NE 241st Avenue, Yacolt, owns five acres along Cedar Creek and said the activity on his property isn't anywhere near the creek. Mr. Fandrich said he is a scavenger farmer; he takes what is left over on the land. He stated that many of the properties he deals with have man-made ditches in them and asked how the buffers will affect those properties.

Morris said that under current code along a man-made ditch that the code would apply; however, it would not apply to agriculture along that ditch.

Fandrich asked how far he would have to stay away from those ditches.

Morris replied that right now he doesn't have to stay away from the ditches and asked how far he would recommend.

Fandrich referred to a 20-acre piece of property that he was recently working and said the entire field has water on it and asked if it would be considered a wetland. Mr. Fandrich felt there should be conscientious use of the land. He asked if property owners are forced to fence around the creeks, how that land would be maintained between the creek and the fence line. He said a property owner can get agricultural tax base on his or her property, but his understanding is that recreational horse ownership does not qualify for that. He asked if that was correct.

Stuart said with non-agricultural designated land that is in current use there is an income test that is required.

Lowry said that was depending upon acreage.

Anita Will, 17115 NE Caples Road, said her property is on Wooden Creek and she owns horses. Ms. Will said with this ordinance she would not be able to own horses or have her barn located where it is currently located. She stated that she keeps her horses away from the creek during part of the year. She said land within a buffer area will have to be cleared in order to be fenced and that means people will bring in heavy equipment to be able to do that. She felt the ordinance was putting a lot on small property owners. Ms. Will also wanted to know what streams have been tested.

Judy Smith, 19633 NE Allworth Road, Battle Ground, said she owns five acres and three horses. Ms. Smith said if there is such concern for the wildlife why are there housing developments on all the mountainsides around Battle Ground and Hockinson.

Nancy Koski, PO Box 340, Brush Prairie, asked if there was information regarding the different sizes of the streams in each of the classification.

Rupley explained that the first classification is “S” and it means waters that are more than cubic feet per second (CFS) (a flow measurement). The second type is called “F” and that is a fish-bearing stream that doesn’t meet the classification of average annual flow of 20 CFS. Rupley said there are two classifications called “N”; N-perennial and N-seasonal which do not have fish habitat. He stated that this is the Department of Natural Resources classification system.

Koski asked if there was currently regulation on prior converted wetland.

Stuart said that was exempt under the wetlands ordinance.

Koski owns 40 acres and said she would not be overly affected by this because her land is agriculture. Ms. Koski has heard that her land will not be agriculture for long because it is close to the city. She said that if the farmers are pushed too hard, then development will come in and the water quality will worsen.

Gary Boldt, 19805 NE 83rd Street, Vancouver, said dairy farms have been using master plans since 2001 which are checked routinely. Mr. Boldt said he would not be offended by a ten-foot buffer, but he believed that the small land owner can’t afford that have even ten feet taken away.

Georgia Goff, 30511 NE 152nd Avenue, Battle Ground, owns 160 acres zoned agriculture and forest. Ms. Goff sells hay, lamb and beef to several customers. She said when areas near creeks are fenced they end up with a lot of weeds. She asked about the streams and creeks located on public lands and whether or not those would be affected.

Ken Pritchard, 19337 NE Allworth Road, Battle Ground, said he has a stream that runs through his property which at its highest will run about a foot wide and a foot deep, but most of the year it is dry. Mr. Pritchard said the result of the ordinance would be that he would lose half of his property from any use of his animals.

Glenn Piekstra, 6310 NE 232nd Avenue, Vancouver, said if this ordinance is approved 10.25 of his 15 acres would be in habitat which is a significant taking. Mr. Piekstra felt the burden of the environment was being forced on just a few people in the county. He said he felt there was a need for buffers, but that these buffers were a little bit large. He asked if under agricultural use he would be allowed to clear remaining property in order to put in more plants.

Lowry replied that the current ordinance exempts only existing agricultural uses.

Piekstra discussed the expense of permits and said in order for him to install a greenhouse he would need a shoreline permit, habitat permit and floodplain permit. He

said the cost of the permits would run about the same as the cost of the greenhouse.. Piekstra said it would be nice if the price of the permits would be more scaled to the amount of the actual use or building.

Jeff Smith, 26402 NE 434th Street, Amboy, said he felt like the farmers were being forced out of their property so developers can take over.

Ed Falls, 3316 NW 289th Street, Ridgefield, owns a 26-acre farm and has a small cow/calf operation. Mr. Falls said the creek on his property goes right through the middle of the property. He said he understood that everyone has to do something to keep the water clean. He felt there would be a lot more pollution from gas and oil pollution coming from roads than the pollution that comes from animals.

Lloyd Handlos, 12904 NE 151st Street, Brush Prairie, said he owns ten acres at this location. Mr. Handlos felt the ordinance was confusing and asked why the wetlands and habitat ordinance are not in the same ordinance so land owners can look in one spot to see what they can do with their property. He said he has a wetland on his property, about six acres. He stated that horses are an extreme economic factor in Clark County. He asked the board to think about flexibility and adaptive management when designing this ordinance. Handlos also wanted to know how the county could allow an asphalt plant in Brush Prairie which will have a significant environmental impact but not allow someone to have their horses next to the stream.

Craig & Anne Taylor, 43203 NE 87th Avenue, Woodland, members of the Clark County Fair Mounted Patrol, Clark County Mounted Search and Rescue, and the Washington Trail Riders Association. Mrs. Taylor said they own two adjoining properties totaling ten acres in timber and pasture. She said that over half of their pasture, about five acres, would be lost. She also said they have a seasonal drainage area from October to March that needs to be addressed. She said her few horses are not doing any more damage to the habitat than the herd of elk that is not neighboring property. Mrs. Taylor stated that \$3.5 million is spent by the horse industry in Clark County.

David Moryc, 320 SW Stark Street, Suite 418, Portland, representing American Rivers, testified in favor of the ordinance as it is currently proposed. Mr. Moryc said the recently approved Lower Columbia River Regional Recovery Plan recognizes the need for strong land use regulations. He felt that this ordinance is more flexible than the previous ordinance in looking at functions and values. Moryc felt the stewardship plans were very important as are the funding opportunities that help offset some of the burden of these ordinances.

Mary Ann Simonds, 17170 NW 40th Avenue, Vancouver, was on the original habitat task force said the group originally wanted flexibility in place. Ms. Simonds said there have only been a couple of stewardship plans submitted to the county since the ordinance was adopted. She said she believed there has not been enough education on this issue. She suggested that the board let the small farmers and the horse community come up with ideas, and that property owners can have their own stream testing kits. Simonds said an inter-connected horse trail system will protect wildlife corridors. She also suggested that conservation easements will also protect habitat conservation areas. She recommended

that the board make a commitment that they do want to protect the rural character of the county; she felt that has been forgotten with these ordinances.

John Matson, 11430 NE Ward Road, Battle Ground, felt this ordinance will take peoples' property away from them. Mr. Matson's property is along China Ditch and he said he will lose a lot of property because of the ordinance. He wanted the rights of the land owners to be protected.

Jason Will, 11313 NE 132nd Avenue, Vancouver, leases 40 acres said it is difficult to get started in agriculture in Clark County these days. Mr. Will said the property he leases is on the LaCamas Creek watershed and there are open ditches that drain the ground. He said he keeps his cattle off when it is wet and rotates the grazing areas. He felt that everyone can work in harmony on this issue.

Carol Levanen, Clark County Citizens United, PO Box 2188, Battle Ground, said the ordinance was overwhelmingly rejected by the planning commission and property owners. She asked that the ordinance go back to the drawing board. Ms. Levanen said the ordinance had a flawed public process when it was originally adopted and continued to have a flawed public process for the review.

Benjamin Lawver, 11301 NE 7th Street, Vancouver, said he just moved from Clark County. Mr. Lawver said critical areas are important for the whole entire area. He said he hoped the county could work with everyone involved to help keep the streams healthy.

Jody Benson, 5202 NE Minnehaha, Vancouver, lives on seven acres that she is developing as a horse property. Ms. Benson has called the conservation district to take care of her property. She noted that it was very difficult for people with animals to attend these types of meetings and hearings. She believed that one house with some horses has a much smaller impact on the streams and fish than several houses with septic tanks. Benson said if property owners have to hire consultants to tell them what to do with their property that would be a very big economic impact on those property owners.

Carmen Steffan expressed concern regarding the raw sewage that is dumped into landfills via disposable diapers. She asked if a drainage ditch can be moved on a piece of property.

Rupley stated he didn't know the answer, but he had that question written down to check into it.

Diane Anderson, Anderson Dairy, 162nd Avenue, Vancouver, said the dairy has taken water samples on their property in fifteen different places. Ms. Anderson said the dairy has been taking these samples since before they were required to do so and the water is always cleaner leaving their property than when it comes into it. She said the water is always the dirtiest coming from the housing developments near the dairy. Anderson said the county needs to talk with the housing developments and find out where their runoff goes.

Susan Rasmussen, 30301 NE Charity Road, LaCenter, said that unless farmers and foresters can be financially viable, the next generation won't want to farm or forest in Clark County. Ms. Rasmussen asked for smaller buffers; she said Clark County had the

largest buffers in the state. She suggested that staff needed to go out and see how the regulations will impact the property owners.

Morris closed public testimony for this evening.

Boldt wanted to get averages from counties in Western Washington regarding their buffers and asked what the consequences would be if the Board went against the WDFW buffers. Commissioner *Boldt* asked how the county can achieve clean water with as little stress as possible particularly with the seasonal streams.

Stuart wanted to see specific real-life examples of how this ordinance, the current and the draft, would affect property owners. Commissioner *Stuart* also wanted to see a better evaluation of the stream types and what the actual value of the stream is. *Stuart* had a hard time with the seasonal stream issue and did not see any reason for them to be protected as they are being protected. *Stuart* felt this needed to go back to the work group (the original task force) that had worked on it to get a sense from them of what is trying to be accomplished by this ordinance and is the structure of the ordinance getting the county to that goal. Commissioner *Stuart* also felt the habitat conservation ordinance needed to be integrated with the wetlands ordinance.

Morris discussed the issue of having fences all over the county and was concerned about the maintenance of the property within those fences. Commissioner *Morris* said a significant suggestion was made that farm interests and equestrian interests join forces to work through some of the issues. She felt that would be a good venture. She wanted to see re-involvement of the original 1997 task force members. *Morris* stated that the wetlands ordinance deals with water that stays in place and riparian areas are those areas that are around water that moves. She stated that said she was not anxious to regulate agriculture and said there were very legitimate questions raised regarding row crops. *Morris* asked Mr. Lowry to find the minimum the county must do in order to be in compliance when it comes to the regulation of agriculture. Commissioner *Morris* then asked if the four original members of the task force were interested in helping update this ordinance.

Mary Ann Simonds, Dan DuPuis, Jim Malinowski, and Dean Sutherland said they would be willing to spend more time on this.

Morris stated that this board needed to abandon the idea that this ordinance will be finished within the next month or six weeks.

Stuart and Boldt agreed.

Morris asked that the next step be that some of the 1997 task force members meet with the current ESA Advisory Committee because that represents a broad spectrum of people. Commissioner *Morris* wanted the group to talk amongst itself about the equity issue.

Stuart wanted to see a lot more incentives in the ordinance. Commissioner *Stuart* said if members of the community want farming and forestry in this county then that is an overarching need of the community that supersedes some of the best available science.

Lowry stated both the DCTED guidelines, which are recommendations and not binding, and a couple of recent court cases suggest that the discretion that the Board has in dealing with best available science is informed decision making. You have to be able to show in your record that you know the consequences of your choices that you are making from a scientific point, what the impacts are, and have made a reasonable judgment in balancing the goals of the act to reach that. *Lowry* said the Board needed to get a better sense of why is the county protecting and once they know the facts then he felt the Board had a large amount of discretion of what the rules ought to be.

Boldt requested that representatives from the farm community, the development community, and Clark County Citizens United be on the task force. He said that in order to have a fair ordinance, everyone needs to be treated equally.

Morris said at some point in January a work session should be scheduled with the Board for an update on the progress of the group.

HEARING ADJOURNED

BOARD OF COUNTY COMMISSIONERS

Betty Sue Morris/s/
Betty Sue Morris, Chair

Marc Boldt/s/
Marc Boldt, Commissioner

Steve Stuart, Commissioner

ATTEST:

Louise Richards/s/
Clerk of the Board

lr/jm